

# Potential Technical Amendments to SB 550

# Quick Overview of SB 550

- **EFFECTIVE DATE:**
  - January 1, 2023
- **APPLIES TO:**
  - SB 550 appears intended to apply to –
    - Public construction contracts
    - Private construction contracts
      - All tiers in the contracting chain
- **ADDRESSES TWO ISSUES:**
  - First, *who* has the responsibility for paying a subcontractor when the public body or owner, as applicable, does not pay the general contractor?
  - Second, *when* must payment occur?

# Quick Overview of SB 550

- CURRENT LAW:

- Public Contracts –

- Virginia's Prompt Payment Act (Article 4 (§ 2.2-4347 et seq.) of Chapter 43 of Title 2.2 of the Code of Virginia) has been in place for many years and requires a contractor and each subcontractor to take one of two actions within seven days of receipt of payment on a public project:
      - 1. Pay the subcontractor the proportionate share of the total payment received; OR
      - 2. Notify the agency and subcontractor in writing of its intention to withhold all or a part of the payment with the reason for nonpayment.
    - See Va. Code § 2.2-4354.

- This is based on similar prompt payment requirements on federally funded contracts. (31 U.S.C. § 3905(b))

# Quick Overview of SB 550

- CURRENT LAW (Cont.):
  - Public Contracts –
    - Traditionally, Virginia has generally not legislated contractual terms between private parties and left private parties to negotiate and agree upon their own terms.
    - As such, over time parties began to include “pay-if-paid” clauses in their contracts that make the public body’s or owner’s (as applicable) payment to the general contractor a condition precedent to payment being due to a subcontractor. The effect of these contract provisions is to shift the risk of a public body’s/owner’s nonpayment from the general contractor to the subcontractor.

# Quick Overview of SB 550

- **CHANGES MADE TO CURRENT LAW BY SB 550:**
  - 1. SB 550 prohibits “pay-if-paid” clauses in subcontracts between general contractors and subcontractors. It holds the general contractor liable for making payment to the subcontractor regardless of whether the general contractor has received payment for the subcontractor’s work from the public body/owner.
  - 2. SB 550 establishes timelines for when –
    - a. owners must make payment to general contractors [private contracts]; AND
    - b. general contractors must make payment to subcontractors (and subcontractors must make payments to sub-subcontractors, and so on) [private contracts].

# Potential Technical Amendments to SB 550 – Three Categories

- Generally
- Public Contracts - § 2.2-4354
- Private Contracts - § 11-4.6

# Potential Technical Amendments to SB 550 - Generally

## 1. Make the definitions of “construction/construction contract,” “contractor/general contractor,” and “subcontractor” uniform in their application to both public contracts (§ 2.2-4354) and private contracts (§ 11-4.6).

Public Contracts - VPPA		Private Contracts - Title 11	
DEFINITIONS			
Construction defined?	Yes - § 2.2-4301 "Construction" means building, altering, repairing, improving or demolishing any structure, building or highway, and any draining, dredging, excavation, grading or similar work upon real property.	No	
Construction contract defined?	No	Yes - § 11-4.6(A) "Construction contract" means a contract between a general contractor and a subcontractor relating to the construction, alteration, repair, or maintenance of a building, structure, or appurtenance thereto, including moving, demolition, and excavation connected therewith, or any provision contained in any contract relating to the construction of projects other than buildings.	
Contractor/subcontractor defined?	Yes - § 2.2-4347 "Contractor" means the entity that has a direct contract with any "state agency" as defined herein, or any agency of local government as discussed in § 2.2-4352.  "Subcontractor" means any entity that has a contract to supply labor or materials to the contractor to whom the contract was awarded or to any subcontractor in the performance of the work provided for in such contract.	Yes - § 11-4.6 (A)  "General contractor" and "subcontractor" have the meanings ascribed thereto in § 43-1, except that those terms shall not include persons solely furnishing materials.  §43-1 = As used in this chapter, the term "general contractor" includes contractors, laborers, mechanics, and persons furnishing materials, who contract directly with the owner, and the term "subcontractor" includes all such contractors, laborers, mechanics, and persons furnishing materials, who do not contract with the owner but with the general contractor.	

# Potential Technical Amendments to SB 550 – Generally

- 2. Clarify that contracts for professional services, including architectural or professional engineering services, are not included in the scope of the bill.



# Potential Technical Amendments to SB 550 – Generally

- 3. Make the “noncompliance/breach” language uniform.

Public Contracts: General Contractor → Subcontractor [§ 2.2-4354(1)]

**Lines 12-13:** Such contractor shall not be liable for amounts otherwise reducible due to the subcontractor's noncompliance with the terms of the contract.

Private Contracts: Owner → General Contractor [§ 11-4.6(B)]

**Lines 57-58:** An owner shall not be required to pay amounts invoiced that are subject to withholding pursuant to the contract for the general contractor's noncompliance with the terms of the contract.

Private Contracts: General Contractor → Subcontractor [§ 11-4.6(C)]

**Lines 72-73:** Such contractors shall not be liable for amounts otherwise reducible pursuant to a breach of contract by the subcontractor.

# Potential Technical Amendments to SB 550 – Generally

- 4. Make the “notice” language uniform.

Public Contracts: General Contractor → Subcontractor [§ 2.2-4354(1)]

**Lines 14-16:** However, in the event that the contractor withholds all or a part of the amount promised to the subcontractor under the contract, the contractor shall notify the subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment.

Private Contracts: Owner → General Contractor [§ 11-4.6(B)]

**Lines 59-62:** However, in the event that an owner withholds all or a part of the amount invoiced by the general contractor under the terms of the contract, the owner shall notify the general contractor, in writing and with reasonable specificity, of his intention to withhold all or part of the general contractor's payment with the reason for nonpayment.

Private Contracts: General Contractor → Subcontractor [§ 11-4.6(C)]

**Lines 74-78:** However, in the event that a contractor withholds all or a part of the amount invoiced by any lower-tier subcontractor under the contract, the contractor shall notify the subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment, specifically identifying the contractual noncompliance, the dollar amount being withheld, and the lower-tier subcontractor responsible for the contractual noncompliance.

# Potential Technical Amendments to SB 550 – Generally

- 5. Establish a timeline for when notice of withholding payment must be given.

The notice provisions establish the requirement to provide notice if payment will be withheld, but they don't establish a timeline for when that notice must be provided.

\* The Workgroup could consider recommending that such timelines be established. One option for establishing these timelines could be to link the timeline for providing the notice with the deadlines already established by SB 550 for when payment must be provided. For example, the language could be amended to state that a general contractor must (i) pay the subcontractor or (ii) provide notice, in writing, of the general contractor's intention to withhold all or a portion of the subcontractor's payment within the earlier of (a) 60 days after receiving an invoice from the subcontractor or (b) seven days after receiving payment from the owner.

# Potential Technical Amendments to SB 550 – Public Contracts (§ 2.2-4354)

- 1. Reconcile the provisions added by SB 550 in subdivision 1 with the existing provisions of the Prompt Payment Act that were moved to subsection 2.

8     **§ 2.2-4354. Payment clauses to be included in contracts.**

9     Any contract awarded by any state agency, or any contract awarded by any agency of local  
10    government in accordance with § 2.2-4352, shall include:

11    1. *A payment clause that obligates a contractor on a construction contract to be liable for the entire*  
12    *amount owed to any subcontractor with which it contracts. Such contractor shall not be liable for*  
13    *amounts otherwise reducible due to the subcontractor's noncompliance with the terms of the contract.*  
14    *However, in the event that the contractor withholds all or a part of the amount promised to the*  
15    *subcontractor under the contract, the contractor shall notify the subcontractor, in writing, of his*  
16    *intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment.*  
17    *Payment by the party contracting with the contractor shall not be a condition precedent to payment to*  
18    *any lower-tier subcontractor, regardless of that contractor receiving payment for amounts owed to that*  
19    *contractor. Any provision in a contract contrary to this section shall be unenforceable.*

20    2. A payment clause that obligates the contractor to take one of the two following actions within  
21    seven days after receipt of amounts paid to the contractor by the state agency or local government for  
22    work performed by the subcontractor under that contract:

23    a. Pay the subcontractor for the proportionate share of the total payment received from the agency

24    attributable to the work performed by the subcontractor under that contract; or

25    b. Notify the agency and subcontractor, in writing, of his intention to withhold all or a part of the  
26    subcontractor's payment with the reason for nonpayment.

# Potential Technical Amendments to SB 550 – Public Contracts (§ 2.2-4354)

- 2. Subdivision 4 (interest clause) – Amend to require general contractors to pay interest on amounts that are past-due in situations in which the general contractor has not been paid by the public body.

30     ~~3. 4.~~ An interest clause that obligates the contractor to pay interest to the subcontractor on all  
31     amounts owed by the contractor that remain unpaid after seven days following receipt by the contractor  
32     of payment from the state agency or agency of local government for work performed by the  
33     subcontractor under that contract, except for amounts withheld as allowed in subdivision 4 2.

# Potential Technical Amendments to SB 550 – Private Contracts (§ 11-4.6)

- 1. Fix catchline for § 11-4.6.

44     § 11-4.6. Liability of contractor for wages of subcontractor's employees.

Potential amendment:

~~§ 11-4.6. Liability of contractor for wages of subcontractor's employees~~ Required contract provisions in construction contracts.

## Potential Technical Amendments to SB 550 – Private Contracts (§ 11-4.6)

- 2. Fix subsection/subdivision lettering to separate out the provisions of § 11-4.6 dealing with the liability of a contractor for the wages of a subcontractor's employees from the new provisions added by SB 550 dealing with owners' and general contractors' payment liability and timing.

# Potential Technical Amendments to SB 550 – Private Contracts (§ 11-4.6)

- 3. Clarify that subsection C of § 11-4.6 applies only to “any **construction** contract,” not “any contract”.
- Line 11 [§ 2.2-4354 (VPPA) – Public Contracts]: “1. A payment clause that obligates a contractor on a **construction** contract ...”
- Line 54 [§ 11-4.6(B) – Private Contracts]: “In any **construction** contract between an owner and a general contractor ...”
- Line 65 [§ 11-4.6(C) – Private Contracts]: “Any contract in which there is at least one general contractor and one subcontractor ...”



# Potential Technical Amendments to SB 550 – Private Contracts (§ 11-4.6)

- 4. Resolve the inconsistency between the timelines for payment that are set out in subsection B for owners and in subsection C for contractors.

Lines 55-57 [§ 11-4.6(B)]: Requires payment “within 60 days of the receipt of an invoice following satisfactory completion of the portion of the work for which the general contractor has invoiced.”

Lines 69-70 [§ 11-4.6(C)]: Requires payment within “60 days of the satisfactory completion of the portion of the work for which the subcontractor has invoiced ...”

# Potential Technical Amendments to SB 550 – Private Contracts (§ 11-4.6)

- 5. Resolve the inconsistent and confusing terminology used in § 11-4.6(C).
  - § 11-4.6(C) uses all of the following terms: "general contractor;" "subcontractor;" "higher-tier contractor;" "lower-tier subcontractor;" "lower-tier contractor;" and "contractor."
  - § 11-4.6(C) could be simplified by just referring to "general contractor" and "subcontractor" and inserting this language similar to this provision from § 2.2-4354 in the VPPA:

Any such contract awarded shall further require the contractor to include in each of its subcontracts a provision requiring each subcontractor to include or otherwise be subject to the same payment and interest requirements with respect to each lower-tier subcontractor.

Questions?



## List of Potential Technical Amendments to SB 550

### Generally

1. Make the definitions of “construction/construction contract,” “contractor/general contractor,” and “subcontractor” uniform in their application to both public contracts (§ 2.2-4354) and private contracts (§ 11-4.6).

	Public Contracts - VPPA	Private Contracts – Title 11
<b>DEFINITIONS</b>		
Construction defined?	<p>Yes - § 2.2-4301</p> <p>"Construction" means building, altering, repairing, improving or demolishing any structure, building or highway, and any draining, dredging, excavation, grading or similar work upon real property.</p>	No
Construction contract defined?	No	<p>Yes - § 11-4.6(A)</p> <p>"Construction contract" means a contract between a general contractor and a subcontractor relating to the construction, alteration, repair, or maintenance of a building, structure, or appurtenance thereto, including moving, demolition, and excavation connected therewith, or any provision contained in any contract relating to the construction of projects other than buildings.</p>
Contractor/subcontractor defined?	<p>Yes - § 2.2-4347</p> <p>"Contractor" means the entity that has a direct contract with any "state agency" as defined herein, or any agency of local government as discussed in § 2.2-4352.</p> <p>"Subcontractor" means any entity that has a contract to supply labor or materials to the contractor to whom the contract was awarded or to any subcontractor in the performance of the work provided for in such contract.</p>	<p>Yes - § 11-4.6 (A)</p> <p>"General contractor" and "subcontractor" have the meanings ascribed thereto in § 43-1, except that those terms shall not include persons solely furnishing materials.</p> <p>§43-1 = As used in this chapter, the term "general contractor" includes contractors, laborers, mechanics, and persons furnishing materials, who contract directly with the owner, and the term "subcontractor" includes all such contractors, laborers, mechanics, and persons furnishing materials, who do not contract with the owner but with the general contractor.</p>

2. Clarify that contracts for professional services, including architectural or professional engineering services, are not included in the scope of the bill.

3. Make the “noncompliance/breach” language uniform.

Public Contracts: General Contractor → Subcontractor [§ 2.2-4354(1)]

**Lines 12-13:** Such contractor shall not be liable for amounts otherwise reducible due to the subcontractor's noncompliance with the terms of the contract.

Private Contracts: Owner → General Contractor [§ 11-4.6(B)]

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**Lines 74-78:** However, in the event that a contractor withholds all or a part of the amount invoiced by any lower-tier subcontractor under the contract, the contractor shall notify the subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment, specifically identifying the contractual noncompliance, the dollar amount being withheld, and the lower-tier subcontractor responsible for the contractual noncompliance.

5. Establish a timeline for when notice of withholding payment must be given.

## **Public Contracts - § 2.2-4354**

1. Reconcile the provisions added by SB 550 in subdivision 1 with the existing provisions of the Prompt Payment Act that were moved to subsection 2.
  - a. Clarify the *type* of contracts to which each subdivision applies – subdivision 1 only applies to construction contracts, but subdivision 2 applies to all contracts (including construction contracts).
  - b. “Entire amount owed” (subdivision 1) vs. “proportionate share” (subdivision 2).
  - c. Clarify that “entire amount owed” does not affect retainage.
  - d. Reconcile subdivisions 1 and 2 with § 11-4.6 (C)?
    - i. When must a contractor pay a subcontractor when the general contractor has not been paid by the public body?
2. Subdivision 4 (interest clause) – Amend to require general contractors to pay interest on amounts that are past-due in situations in which the general contractor has not been paid by the public body.

## **Private Contracts - § 11-4.6**

1. Fix catchline for § 11-4.6.
  - a. Current catchline = § 11-4.6. Liability of contractor for wages of subcontractor's employees.
2. Fix subsection/subdivision lettering to separate out the provisions of § 11-4.6 dealing with the liability of a contractor for the wages of a subcontractor's employees from the new provisions added by SB 550 dealing with owners' and general contractors' payment liability and timing.
3. Clarify that subsection C of § 11-4.6 applies only to “any construction contract,” not “any contract.”
4. Resolve the inconsistency between the timelines for payment that are set out in subsection B for owners and in subsection C for contractors.

Lines 55-57 [§ 11-4.6(B)]: Requires payment “within 60 days of the receipt of an invoice following satisfactory completion of the portion of the work for which the general contractor has invoiced.”

Lines 69-70 [§ 11-4.6(C)]: Requires payment within “60 days of the satisfactory completion of the portion of the work for which the subcontractor has invoiced ...”

5. Resolve the inconsistent and confusing terminology used in § 11-4.6(C). § 11-4.6(C) uses all of the following terms: "general contractor;" "subcontractor;" "higher-tier contractor;" "lower-tier subcontractor;" "lower-tier contractor;" and "contractor." § 11-4.6(C) could be simplified by just referring to “general contractor” and “subcontractor” and inserting this language similar to this provision from § 2.2-4354 in the VPPA:

Any such contract awarded shall further require the contractor to include in each of its subcontracts a provision requiring each subcontractor to include or otherwise be subject

to the same payment and interest requirements with respect to each lower-tier subcontractor.



Bill #

**A BILL to amend and reenact § 11-4.6 of the Code of Virginia, relating to contracts; required clauses.**

Be it enacted by the General Assembly of Virginia:

1. That § 11-4.6 of the Code of Virginia is amended and reenacted as follows:

**§ 11-4.6. ~~Liability of contractor for wages of subcontractor's employees~~ Required contract provisions in construction contracts.**

A. As used in this section, unless the context requires a different meaning:

"Construction contract" means a contract between a general contractor and a subcontractor relating to the construction, alteration, repair, or maintenance of a building, structure, or appurtenance thereto, including moving, demolition, and excavation connected therewith, or any provision contained in any contract relating to the construction of projects other than buildings.

"General contractor" and "subcontractor" have the meanings ascribed thereto in § 43-1, except that those terms shall not include persons solely furnishing materials.

"Owner" means a person or entity, other than a public body as defined in § 2.2-4301, responsible for contracting with a general contractor for the procurement of a construction contract.

B. 1. In any construction contract between an owner and a general contractor, the parties shall include a provision that requires the owner to pay such general contractor within 60 days of the receipt of an invoice following satisfactory completion of the portion of the work for which the general contractor has invoiced. An owner shall not be required to pay amounts invoiced that are subject to withholding pursuant to the contract for the general contractor's noncompliance with the terms of the contract. However, in the event that an owner withholds all or a part of the amount invoiced by the general contractor under the terms of the contract, the owner shall notify the general contractor, in writing and with reasonable specificity, of his intention to withhold all or part of the general contractor's payment with the reason for nonpayment. Failure of an owner to make timely payment as provided in this subsection shall result in interest penalties consistent with § 2.2-4355. Nothing in this subsection shall be construed to apply to or prohibit the inclusion of any retainage provisions in a construction contract.

~~C.~~ 2 Any contract in which there is at least one general contractor and one subcontractor shall be deemed to include a provision under which any higher-tier contractor is liable to any lower-tier subcontractor with whom the higher-tier contractor contracts for satisfactory performance of the subcontractor's duties under the contract. Such contract shall require such higher-tier contractor to pay such lower-tier subcontractor within the earlier of (i) 60 days of the satisfactory completion of the portion of the work for which the subcontractor has invoiced or (ii) seven days after receipt of amounts paid by the owner to the general contractor or by the higher-tier contractor to the lower-tier contractor for work performed by a subcontractor pursuant to the

terms of the contract. Such contractors shall not be liable for amounts otherwise reducible pursuant to a breach of contract by the subcontractor. However, in the event that a contractor withholds all or a part of the amount invoiced by any lower-tier subcontractor under the contract, the contractor shall notify the subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment, specifically identifying the contractual noncompliance, the dollar amount being withheld, and the lower-tier subcontractor responsible for the contractual noncompliance. Payment by the party contracting with the contractor shall not be a condition precedent to payment to any lower-tier subcontractor, regardless of that contractor receiving payment for amounts owed to that contractor, unless the party contracting with the contractor is insolvent or a debtor in bankruptcy as defined in § 50-73.79. Any provision in a contract contrary to this section shall be unenforceable. Failure of a contractor to make timely payment as provided in this subsection shall result in interest penalties consistent with § 2.2-4355. Nothing in this subsection shall be construed to apply to or prohibit the inclusion of any retainage provisions in a construction contract.

~~D.~~ C. 1. Any construction contract between a general contractor and its subcontractor and any lower tier subcontract entered into on or after July 1, 2020, shall be deemed to include a provision under which the general contractor, its subcontractor, and the subcontractor at any lower tier are jointly and severally liable to pay the employees of any subcontractor at any lower tier the greater of (i) all wages due to a subcontractor's employees or to the lower tier subcontractor's employees at such rate and upon such terms as shall be provided in the employment agreement between the subcontractor and its employees or (ii) the amount of wages that the subcontractor or any lower tier subcontractor is required to pay to its employees under the provisions of applicable law, including the provisions of the Virginia Minimum Wage Act (§ 40.1-28.8 et seq.) and the federal Fair Labor Standards Act (29 U.S.C. § 201 et seq.).

~~E.~~ 2. A general contractor shall be deemed to be the employer of a subcontractor's employees at any tier for purposes of § 40.1-29. If the wages due to the subcontractor's employees under the terms of the employment agreement between a subcontractor and its employees are not paid, the general contractor shall be subject to all penalties, criminal and civil, to which an employer that fails or refuses to pay wages is subject under § 40.1-29. Any liability of a general contractor pursuant to § 40.1-29 shall be joint and several with the subcontractor that failed or refused to pay the wages to its employees.

~~F.~~ 3. Except as otherwise provided in a contract between the general contractor and the subcontractor, the subcontractor shall indemnify the general contractor for any wages, damages, interest, penalties, or attorney fees owed as a result of the subcontractor's failure to pay wages to the subcontractor's employees as provided in ~~subsection D~~ subdivision C 1, unless the subcontractor's failure to pay the wages was due to the general contractor's failure to pay moneys due to the subcontractor in accordance with the terms of their construction contract.

~~G.~~ 4. The provisions of this ~~section~~ subsection shall only apply if (i) it can be demonstrated that the general contractor knew or should have known that the subcontractor was not paying his employees all wages due, (ii) the construction contract is related to a project other than a single family residential project, and (iii) the value of the project, or an aggregate of projects under one construction contract, is greater than \$500,000. As evidence a general contractor or

subcontractor, regardless of tier, may offer a written certification, under oath, from the subcontractor in direct privity of contract with the general contractor or subcontractor stating that (a) the subcontractor and each of his sub-subcontractors has paid all employees all wages due for the period during which the wages are claimed for the work performed on the project and (b) to the subcontractor's knowledge all sub-subcontractors below the subcontractor, regardless of tier, have similarly paid their employees all such wages. Any person who falsely signs such certification shall be personally liable to the general contractor or subcontractor for fraud and any damages the general contractor or subcontractor may incur.

